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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

February 5, 1997

VIA HAND-DELIVERY

Andrew S. Fishel  
Managing Director  
Federal Communications Commission  
Room 852  
1919 M Street, N.W.  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: James A. Kay, Jr., WT Docket No. 94-147

Dear Mr. Fishel:

This firm is counsel for James A. Kay, Jr. ("Kay") in the above-captioned matter. Kay has pending before the Commission an Application for Review of the Administrative Law Judge's decision in In the Matter of James A. Kay, Jr., 11 FCC Rcd 6585 (ALJ 1996).

We recently reviewed a copy of the FCC's Opposition to Petition for Writ of Mandamus filed by Marc D. Sobel d/b/a Air Wave Communications ("Sobel") in the United States Court of Appeals for the District of Columbia Circuit (Case No. 96-1361), a copy of which is attached hereto. The FCC's Opposition contains numerous references to Kay and Sobel's relationship with Kay and states that "the Commission currently has before it a staff recommendation for action directly responsive to Sobel's complaint." Given the similarities identified by the FCC between its pending case against Kay and Sobel's close relationship with Kay, the "staff recommendation" of the Wireless Telecommunications Bureau to the Commission must contain references to Kay and/or the pending proceeding involving Kay. Pursuant to Section 1.1214 of the Commission's Rules, we are advising you of our belief that the "staff recommendation" violated the Commission's ex parte rules (Section 1.1200, et seq. of the Commission's Rules), by virtue of the fact that these documents were not supplied to Kay at the same time they were delivered to "decision-making personnel" of the Commission.

Under these circumstances, we request a copy of the staff recommendation to the Commission and any other communications to the Commission concerning Kay and/or Sobel as well as a determination that the Wireless Telecommunications Bureau

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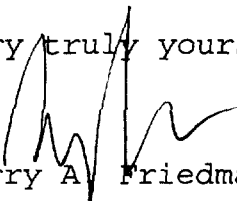
*Attorneys at Law*

Andrew S. Fishel  
Managing Director  
Federal Communications Commission  
February 5, 1997  
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violated the ex parte rules. We further request that if it is determined that the ex parte rules were violated, that appropriate sanctions be issued pursuant to the provisions of Section 1.1216 of the Commission's Rules.

Thank you for your assistance. Please do not hesitate to call me with any questions.

Very truly yours,



Barry A. Friedman

Enclosure

cc: James A. Kay, Jr. (w/enclosure)  
Gary P. Schonman, Esquire (w/enclosure)  
W. Riley Hollingsworth (w/enclosure)

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In The  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*In re*

MARC D. SOBEL, d/b/a/ AIR WAVE  
COMMUNICATIONS.

Petitioner

No. 96-1361

**FCC OPPOSITION TO PETITION FOR WRIT OF MANDAMUS**

The Federal Communications Commission opposes the petition for writ of mandamus filed by petitioner in the captioned case. Petitioner Sobel seeks an order from the Court directing the FCC to act on a number of applications and other requests for action that he has filed with the FCC. As discussed below, this matter involves a complicated factual inquiry related to an ongoing hearing proceeding involving enforcement action against another party before the Commission, as well as an ongoing investigation of Sobel. In the circumstances, the time that the agency has devoted to pending matters involving petitioner is fully justified. Sobel has failed to meet the very high standard required of a party seeking the extraordinary remedy of mandamus. In any event, the Commission currently has before it a staff recommendation for action directly responsive to Sobel's complaint. We anticipate Commission action on the staff's recommendation soon.

**Background**

Petitioner Sobel holds a number of FCC land mobile radio station licenses, principally in the Specialized Mobile Radio Service (SMR) in the Los Angeles area. This service generally provides mobile radio services to businesses. Although the SMR service is used primarily for voice communications, including interconnection with the public switched telephone network, systems are also being developed for data and facsimile services. The development of a digital, rather than analog, SMR marketplace is allowing new features and

services, such as two-way acknowledgment paging, credit card authorization, automatic vehicle location, fleet management, inventory tracking, remote database access, and voice-mail. The growth of the SMR service has been significant due to these new developments.

Sobel has been the subject of an ongoing FCC investigation, particularly with respect to his relationship with another licensee in the Los Angeles area, James A. Kay, Jr. In a December 1994 order, the Commission commenced a hearing proceeding to order Kay to show cause why 164 land mobile licenses he held or controlled should not be revoked or cancelled, why he should not be ordered to cease and desist from certain violations of the Communications Act and why an order of forfeiture should not issue. See Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture: In the Matter of James A. Kay, Jr., 10 FCC Rcd 2062 (1994). At the time of this action, the Commission believed that because of Sobel's business relationships with Kay, some of Sobel's licenses were in fact controlled by Kay. Kay and Sobel denied any such relationship, and the Commission subsequently removed the disputed licenses from the Kay hearing in order to permit its staff to conduct a separate investigation of Sobel. See In the Matter of James A. Kay, Jr., 11 FCC Rcd 5324 (1996). In a June 11, 1996 letter, a copy of which is attached to Sobel's mandamus petition (Att. 9), the staff sought information from Sobel regarding his relationship with Kay. A staff recommendation for an agency order based on that investigation is now before the Commission.

In a May 1996 action, the presiding Administrative Law Judge in the Kay proceeding found Kay unqualified to be a Commission licensee, revoked all of his licenses and ordered Kay to forfeit \$75,000. In the Matter of James A. Kay, Jr., 11 FCC Rcd 6585 (ALJ 1996). Kay's application for review of that decision is currently pending before the Commission.

In the subject petition for writ of mandamus, Sobel complains of FCC delay on a

number of applications he has pending before the Commission and which have not been acted on during the pendency of the Kay hearing and the subsequent staff investigation of Sobel. Sobel acknowledges that he and James A. Kay are "friends and have a business relationship" and that "some" of the stations licensed to Sobel are in fact managed by Kay pursuant to a management agreement. Pet. at 3. As Sobel also correctly observes, management arrangements between licensees and others are not necessarily improper. Pet. at n.11.

### Argument

Relief in the nature of mandamus is a "drastic remedy," Will v. United States, 389 U.S. 90, 104 (1967), reserved for "really extraordinary causes." Ex parte Fahey, 322 U.S. 258, 260 (1947). At a minimum, a petitioner must show that its right to issuance of such a writ is "clear and indisputable." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988), quoting, Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953), and United States v. Duell, 172 U.S. 576, 582 (1899). See also Air Line Pilots Ass'n v. DOT, 880 F.2d 491, 503 (D.C.Cir. 1989); In re Richard Thornburgh, 869 F.2d 1503, 1506-07 (D.C.Cir. 1989). Sobel's petition does not meet this very high standard -- indeed does not even discuss it. The petition fails to justify action by the Court directing the agency to re-order its priorities and place the particular matter in which Sobel is interested ahead of others that the agency has judged more important.

Whether the time an agency takes to complete a matter is so egregious as to warrant mandamus is governed by a "rule of reason." See MCI Communications Corp. v. FCC, 627 F.2d 322, 340 (D.C.Cir. 1980). Although the standards are not ironclad, what is reasonable is governed by such considerations as whether Congress has provided in the agency's enabling statute a timetable or other indication of the speed with which it expects the agency to proceed. In addition, the Court has held that delays that might be reasonable in the sphere

of economic regulation are less tolerable when human health and welfare are at stake. The Court has also held that in considering mandamus requests alleging unreasonable delay, courts should consider the effect of expediting action on agency activities of a higher or competing priority and should take into account the nature and extent of the interests prejudiced by delay. See generally Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 79-80 (D.C.Cir. 1984); see also Action on Smoking and Health v. Department of Labor, 100 F.3d 991, 994-95 (D.C.Cir. 1996); Monroe Communications Corp. v. FCC, 840 F.2d 942, 945-46 (D.C.Cir. 1988).

The length of time that Sobel's applications have been pending before the Commission is not egregious under the circumstances, as claimed by the petition. Of the twelve matters about which Sobel complains, as set out in Attachment 2 to the petition, two date back to November and December 1993, six were filed in 1994 and the remaining four in 1995. During that entire period, Sobel has been either intertwined with the Kay investigation and hearing or, since June 1996, directly under investigation by the FCC. It is not unreasonable for the Commission to defer action on applications before it when it is, at the same time, investigating questions concerning that applicant's conduct with respect to other matters before the agency. This is particularly true in light of the Commission's responsibility under the Communications Act to ensure applicants' qualifications before granting or renewing licenses. See, e.g., 47 U.S.C. 308. The motion fails to demonstrate that the Commission has abused its discretion in the circumstances of this case.

In addition, the proceedings in question here do not involve specific Congressional

timetables for action.<sup>1</sup> nor are issues of human health and welfare at stake, where the court has indicated that delays are less tolerable. Even in circumstances involving such issues, however, the court has recognized that agencies have substantial discretion in establishing regulatory priorities, which courts ordinarily should respect. See Action on Smoking & Health, 100 F.3d at 994-95; In re Barr Laboratories, Inc., 930 F.2d 72, 74 (D.C.Cir. 1991) ("respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency choice of priorities"); Monroe Communications, 840 F.2d at 945-46. Moreover, while generally claiming that he is harmed by the delay, Sobel offers no specific explanation of the nature and extent of his claimed prejudice from the Commission not having acted on his applications to this point. Sobel has failed to show any injury at all, much less irreparable injury, that would warrant interference with the Commission's priorities -- particularly where, as here, it is involved in investigating possible misconduct by licensees.

"[T]his court has upheld in the strongest terms the discretion of regulatory agencies to control the disposition of their caseload." Nader v. FCC, 520 F.2d 182, 195 (D.C.Cir.1975) (citations omitted). The FCC enjoys express statutory authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. 154(j); see Cellular Mobile Systems of Penn., Inc. v. FCC, 782 F.2d

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<sup>1</sup> The only remotely relevant statutory time period set out in the Communications Act is contained in 47 U.S.C. 155(d), which establishes as an "objective" the issuance of a final decision within six months of the close of the initial hearing in a licensing proceeding. The Court recognized in Monroe Communications that this statutory goal was not a mandatory requirement. In any event, no hearing has yet been designated with respect to Sobel, and any hearing that might be scheduled would not be an initial licensing hearing. More generally, the Court has held that even where statutes establish very specific requirements, an agency's failure to act within such statutory time limits is not, in itself, an abuse of discretion. See National Congress of Hispanic Am. Citizens (El Congreso) v. Marshall, 626 F.2d 882, 888 (D.C.Cir.1979).

182, 197 (D.C.Cir. 1985). See also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-44, 98 S.Ct. 1197, 1211-12, 55 L.Ed.2d 460 (1978) ("administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties' ") (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940)).

In the face of this strong policy, Sobel's meager showing is simply inadequate to meet the requirement that a mandamus petitioner demonstrate a clear and indisputable right to the relief requested. In addition, as we have noted, there is presently pending before the Commission a staff proposal that is directly responsive to the complaints set forth in the petition. We expect Commission action on that recommended action soon.

#### Conclusion

The petition fails to justify grant of the extraordinary remedy of mandamus in the circumstances present here. The petition should, accordingly, be denied.

Respectfully submitted,

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January 27, 1997